**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**REGION 2**

In the Matter Of:

DALTON SCHOOLS, INC. d/b/a
THE DALTON SCHOOL,

Respondent, Case 02-CA-138611

-and- **Oral Argument Requested**

DAVID BRUNE, An Individual

Charging Party.

# RESPONDENT THE DALTON SCHOOL'S REPLY BRIEF IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW ARTHUR J. AMCHAN AND IN RESPONSE TO THE GENERAL COUNSEL'S ANSWERING BRIEF

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Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board (the "Board"), Respondent Dalton Schools, Inc. d/b/a The Dalton School (the "Respondent" or "Dalton") respectfully submits this reply brief in further support of its exceptions to the Decision of Administrative Law Judge Arthur J. Amchan (the "Judge"), dated June 1, 2015 (the "Decision"), and in response to the answering brief of the General Counsel, dated August 21, 2015 (the "Answering Brief").

## PRELIMINARY STATEMENT

In its Answering Brief, the General Counsel attempts to divert the Board's attention from the weaknesses of the Charging Party's case by, among other tactics, attempting to recast the record evidence in a self-serving manner and misconstruing Board precedent to its own benefit. However, the totality of the record evidence, as well as both Board and circuit court precedent, mandate the Board's rejection of the arguments set forth in the General Counsel's Answering Brief and all other post-hearing submissions, and its reversal of the Judge's erroneous Decision. As explained in more detail below, this Decision stands against the weight of the evidence and established Board and circuit court precedent.

As a threshold matter, the Judge erred in finding that the Charging Party's February 6, 2014 e-mail thread was protected concerted activity when in fact, the record evidence confirms that it was not. However, even if the Board affirms the Judge's erroneous finding that the February 6th e-mail thread *was* protected concerted activity, it is indisputable that the opprobrious nature of this communication caused it to lose the protections of the National Labor Relations Act (the "Act").

To the extent that the General Counsel attempts to distract the Board with meritless arguments and inapposite Board precedent, it does so to conceal the fact that it has failed to carry its burden of proof in this matter. Here, the General Counsel has failed to show that Respondent

had *actual knowledge* of any purported protected concerted activity – *i.e.*, the *sine qua non* to sustaining a Section 8(a)(1) violation. As explained more fully in Respondent's post-hearing submissions, the Board must reverse the Judge's findings, dismiss the Charging Party's Complaint in its entirety and deny the Charging Party's request for remedies.

## ARGUMENT[1]

### A. The Charging Party's February 6th E-mail Thread was Not Protected Concerted Activity.

As explained more fully in Respondent's Post-Hearing and Exceptions Briefs, the Charging Party's February 6th e-mail thread[2] was neither protected nor concerted. As a threshold matter, the subject matter of the February 6, 2014 e-mail thread was not protected because it did not relate to "terms and conditions of employment." *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991) (holding that "terms and conditions of employment" encompass topics such as wages, benefits, and working hours, among other things). Instead, the Charging Party's e-mail was an *ad hominem* attack on Dalton's Head of School and it is well settled that such attacks are not protected under the Act.[3] *See, e.g.*, *Media Gen. Operations, Inc. v. NLRB*, 560 F.3d 181,

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[1] In an effort to distract the Board and obfuscate the relevant issues in this case, the General Counsel asks the Board to strike Respondent's Exceptions Brief on the asserted ground that it does not comply with Rule 102.46(c)(2) of the Board's Rules and Regulations (the "Board's Rules"). *See* Answering Brief, p. 7. However, this argument has no merit and therefore Respondent's appeal must be decided on the merits. Respondent's exceptions and accompanying brief are in substantial compliance with the Board's Rules. *Hertz Corp.*, 326 NLRB No. 96 (1998) ("We deny the Respondent's motion to strike the Charging Party's exceptions because we find that, although not in strict conformance with Rule 102.46, the exceptions are in substantial compliance with the Board's Rules."); *Screen Print Corp.*, 151 NLRB No. 119 (1965).

[2] Ignoring the weight of the evidence, the Judge erroneously concluded that the protected concerted e-mail was the "*second e-mail sent to other department members.*" (D. 4:2) (emphasis added). However, in evaluating whether the Charging Party was engaged in protected concerted activity, the Judge erred in not considering *both portions* of the Charging Party's February 6, 2014 e-mail thread. *SB Tolleson Lodging, LLC d/b/a Best Western*, 2015 WL 1539767 (N.L.R.B. Div. of Judges, April 7, 2015) (citing *National Specialties Installations*, 344 NLRB 191, 196 (2005) ("The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances.")

[3] In the at-issue e-mail in this matter, the Charging Party unabashedly refers to Dalton's Head of School as a "liar" who is "[not] honest, [not] forthright, [not] upstanding, [not] moral, [not] considerate [and] much less intelligent or wise." GC-3.

189 (4th Cir. 2009) (holding that an "opprobrious *ad hominem* attack on a supervisor" was unprotected by the Act); *See also* Exceptions Brief, p. 13 - 20.

In addition to not being protected, the February 6, 2014 e-mail thread was also not concerted because the Charging Party did not act "*with or on the authority of his colleagues*." *Tasker Healthcare Grp.*, 41 N.L.R.B. AMR 1 (2013) (emphasis added). As explained in more detail in Respondent's Exceptions Brief, the record evidence negates a finding that the Charging Party acted with or on the authority of his colleagues in drafting the February 6, 2014 e-mail thread. *See, e.g.*, Tr. 110:8-9 (Q: "They are *your* words. Your colleagues didn't edit this?" A: "No they didn't") (emphasis added); (GC-3) ("*I think . . . I think . . . I think . . .*") (emphasis added); Exceptions Brief, p. 16 – 17. Although the General Counsel focuses on the use of pronouns "us," "we" and "our" in an effort to establish that the at-issue e-mail was concerted, it conveniently ignores the Charging Party's repetitive use of the pronoun "I" in the February 6, 2014 e-mail thread. The Charging Party's predominate use of "I" establishes that the Charging Party was acting on his own, rather than with or on the authority of his colleagues. Indeed, as emphasized in Respondent's Post-Hearing and Exceptions Briefs, the Chair of the Theater Department's decision[4] to *single out* the Charging Party's February 6, 2014 e-mail, and report its content to the Head of School, negates a finding that the Charging Party was expressing group-

[4] Although in its post-hearing brief, the General Counsel admitted that the Chair of the Theater Department's supervisory authority was not an "issue in this case" (Tr. 111:15-17), the General Counsel now attempts to make it an issue. *See* Answering Brief, p. 14 -17. The General Counsel now argues that if the Board determines that the Chair of the Theater Department *is* a statutory supervisor, any knowledge of the purportedly concerted nature of the February 6, 2014 e-mail thread would be imputed to Respondent. However, it is well-settled Board law that an employer can successfully rebut this imputation of knowledge by showing, as Respondent did here, that the supervisor in question "did not pass on this information [of protected activity] to higher [management]." *State Plaza, Inc.*, 347 NLRB 755, 757 (2006). Here, the Chair of the Theater Department shared only the "[Charging Party's thoughts" – not the thoughts of the Theater Department – with Dalton's Head of School. *See* GC-3 ("Here is [sic] David's thoughts").

wide views and was engaged in concerted activity under the meaning of the Act. *See* Exceptions Brief, p. 16.

Similarly, the record evidence does not support a finding that the Charging Party's e-mails were "clearly intended to induce group action." D. 7:25. Although the General Counsel takes issue with Respondent's argument that the February 6, 2014 e-mail thread did not intend to incite group action, the Charging Party's testimony and the plain language of his February 6, 2014 e-mail thread confirm that rather than attempting to *induce* group action, the Charging Party actively attempted to *thwart* any such action. The record confirms that he explicitly discouraged his colleagues from bringing anything to the attention of the administration or "demanding" anything from the administration (R-5). Tr. 59:20-25; Tr. 59:1; GC-6 ("*I really don't think the department should send this letter to the administration*") (emphasis added).

**B. Even if the February 6th E-mail Thread was Protected Concerted Activity, its Opprobrious Nature Caused it to Lose the Protections of the Act.**

The Board's Decision in *Atlantic Steel* and its progeny have established that an employee's purportedly concerted activity or comments lose the protection of the Act if, in the course of engaging in such activity, the employee uses "sufficiently opprobrious, profane, defamatory, or malicious language." *Media Gen. Op., Inc. v. McMillen*, 12-CA-24770, 2007 WL 601571 (N.L.R.B. Div. of Judges Feb. 22, 2007). In determining whether the employee's activity or communication is sufficiently opprobrious, the Board considers the following *Atlantic Steel* factors: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices." *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). As explained in greater detail in Respondent's Exceptions Brief, the Judge erred in failing to apply the *Atlantic Steel* framework to assess whether the e-mail thread lost the protections of the Act;

as set forth in more detail below, the weight of the evidence confirms that it did lose the Act's protection.

Here, with respect to the first prong of the *Atlantic Steel* factors, the "place of discussion" was the e-mail listserv of an independent, co-educational day school for school-aged children. Tr. 17:16-18. The application of this prong requires an analysis of how the "academic world" differs from the traditional "industrial setting" which the Act is designed to accommodate. *Carleton College. v. NLRB*, 230 F.3d 1075, 1081 (8th Cir. 2000). Although courts have held that employees are "permitted some leeway for impulsive behavior when engaging in concerted activity," it is well settled that this leeway is not unlimited, but instead is balanced against an employer's right to maintain order and respect." *Pipe Realty Co.*, 313 NLRB 1289, 1290 (1994); *see also Carleton Coll. v. NLRB*, 230 F.3d at 1081 (holding that an employer must tolerate "salty language" in an industrial context, but that this mandate of tolerance may not be "imposed blindly" on an academic environment where collegiality is "not only a legitimate academic interest, but a necessary one"). Respondent does not contend that the rights of teachers are "any less" as purported by the General Counsel, but instead notes the judicially-recognized idea that as a "place of discussion," the academic world is governed by different norms of conduct than the industrial setting. *Id.* Indeed, the hearing record clearly establishes that Dalton's interest in fostering and maintaining mutual respect among faculty is a necessary interest in an academic setting. *See Carleton Coll.*, 230 F.3d at 1081; R-1; R-2. Dalton teachers are expected to "exhibit a spirit of willingness and collaboration," serve as "role models for students" and as "good colleagues" to their peers. R-2 at 23.

As previously established, in the at-issue e-mail in this matter, the Charging Party unabashedly refers to Dalton's Head of School as a "liar" who is "[not] honest, [not] forthright,

[not] upstanding, [not] moral, [not] considerate [and] much less intelligent or wise." GC-3. Given the heightened importance of collegiality in the academic world, the Charging Party's description of the Head of School "evidenced his disrespect" of the administration and an "unwillingness to commit to act in a professional manner," thereby "render[ing] him unfit for future employment" at Dalton. *Carleton Coll.*, 230 F.3d at 1081. All of this gave rise to Dalton's rescission of the Charging Party's employment contract.

With respect to the second and third prongs set forth by the Board in *Atlantic Steel*, the subject matter of the at-issue e-mail was the Charging Party's individual "griping" about the senior administration, not an expression of group-wide concerns about working conditions. The "nature" of the Charging Party's comments was angry. Tr. 70:16-17. In fact, the nature and tenor of the Charging Party's comments was so opprobrious and "angry" that the Charging Party testified it was never intended for the "eyes" of the administration, and that he "regretted" authoring it. *Id.*

Finally, with respect to the fourth prong, the General Counsel did not introduce any evidence that the Charging Party's e-mail "outburst" was provoked by any unfair labor practices. The Judge specifically acknowledges this fact in his Decision (D. 9 at fn. 10), and the General Counsel similarly acknowledges it in its Answering Brief. *See* Answering Brief, p. 24.

Resultantly, because all four prongs of the *Atlantic Steel* test indicate opprobrious speech, the Judge erred in both failing to apply the *Atlantic Steel* framework[5] and failing to conclude that the Charging Party's February 6, 2014 e-mail lost the protection of the Act. But for the application of the incorrect legal standard, the Judge would have found that the Charging Party

[5] The General Counsel attempts to argue that "[t]o the extent that Respondent did not except to the Judge's conclusion that [the] [Charging Party's] e-mail would not lose the protections of the act under the totality of circumstances analysis, it has waived its right to file an exception on this point." *See,* Answering Brief, p. 21. However, Respondent *did* except to this conclusion. *See*, Respondent's Exceptions 49, 50.

lost the protections of the Act. The Board cannot countenance the Judge's application of the wrong legal standard and must reverse the Judge's Decision.

**C. Respondent Had No Knowledge of Any Protected Concerted Activity.**

The Board has explicitly held that the General Counsel presents a *prima facie* case that an employer discharged an employee in violation of Section 8(a)(1) *only* when the evidence shows that "the employer knew of the *concerted nature of the activity*." *Amelio's*, 301 NLRB 182, 182 (1991) (emphasis added).[6] Although the Judge nonetheless *still* improperly concluded that the General Counsel had met its burden, even General Counsel concedes that "*until the hearing, there is no evidence that Respondent knew*" of any purported protected concerted activity among members of the Theater Department. Answering Brief, p.10, fn. 16. In its Answering Brief, the General Counsel describes the e-mail communications that both preceded and followed the Charging Party's February 6th e-mail thread in painstaking detail (Answering Brief, p. 3 – 4), including who is included on the list-serv, as well as the subject matter of these e-mails. *See* Answering Brief, p. 2-3. However, the record fell short of establishing that the decision-maker had actual knowledge of *any* of these e-mails with the exception of the *content* of the Charging Party's February 6, 2014 e-mail, thereby rendering these references superfluous.[7]

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[6] Even if Respondent had known that the Charging Party sent the at-issue e-mail to members of the Theater Department – it did not – knowledge of the e-mail exchange would not be enough. The Board in *Amelio's* explicitly held that the employer must know of the concerted nature of the activity. The General Counsel admits this fact in its Answering Brief. The General Counsel states, "[t]o be sure, the inquiry is whether Respondent *knew that Brune's February 6 e-mail . . . was concerted*." Answering Brief, p. 14.

[7] In fact, the General Counsel concedes that the Chair of the Theater Department "copied only the text of [the Charging Party's] e-mail and removed the information to show that he sent the e-mail to the others in the Theater Department." Answering Brief, p. 4.

**D. The Dalton Administration Did Not Unlawfully Interrogate the Charging Party.**

As previously established in Respondent's Exceptions Brief, the Judge erred in finding, *sua sponte*, that Respondent violated Section 8(a)(1) in "interrogating" the Charging Party on March 11, 2014, despite the fact that the General Counsel did not allege this violation in either the Complaint or the Amended Complaint. *See, e.g.*, *Champion Int'l Corp.*, 339 NLRB 672, 673 (2003) (holding that it is "axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is").

Here, the only violation alleged in the Amended Complaint and contemplated and litigated by the parties was that Respondent violated Section 8(a)(1) of the Act when it elected not to renew the Charging Party's teaching contract. Indeed, Respondent did not have sufficient notice of the interrogation claim (or a reason to suspect such a claim) to allow it to elicit facts through witness testimony that would disprove a finding of liability; therefore, the General Counsel's reliance on the Board's decision in *Pergament United Sales*, 296 NLRB 333, 334 (1989) is misplaced. In *Pergament*, the Board affirmed the administrative law judge's finding that the respondents were not prejudiced by the General Counsel's failure to amend the complaint to include an additional violation where the issue of the added violation "*was fully litigated at the hearing*." *Id.* However, here, Respondent would be unfairly prejudiced if the Board were to affirm the Judge's erroneous Decision and consider the *ad hoc* interrogation claim.[8] Furthermore, as a practical matter, if the General Counsel has not alleged interrogation,

[8] Even assuming *arguendo* that the Board *were* to consider the merits of the unalleged and improper interrogation claim, the facts set forth at the hearing fail to establish that Respondent unlawfully interrogated the Charging Party. The Charging Party testified that the March 11, 2014 meeting was "essentially a debriefing meeting about the situation" (Tr. 68:10-11) during which the Charging Party explicitly states that *he* discussed the *Thoroughly Modern Millie* situation and was encouraged to express his "opinion" (Tr. 68:12). Although the Judge suggests that the meeting was "an investigation that was motivated by Respondent's animus towards Brune's

the Board should be circumspect about making a *sua sponte* finding that interrogation has occurred. If the General Counsel – who is well-versed on specific circumstances of this case – opted not to pursue an interrogation claim as part of the proceedings before the Judge, it should not be allowed to do so *after* the hearing in this matter.[9]

**E. Respondent's Decision Not to Renew the Charging Party's Employment Contract was Predicated on the Charging Party's Inappropriate and Disloyal Conduct, Not Any Protected Concerted Activity.**

After a full and complete hearing of the issues in this case, Counsel for the General Counsel failed to make a *prima facie* showing to support even the inference that protected concerted conduct was a motivating factor in Dalton's decision not to renew the Charging Party's employment contract. In fact, as explained in more detail above, the Charging Party was not engaged in protected concerted activity, and even assuming he was, he ultimately lost the Act's protection. Moreover, the senior administration had no knowledge of any group activity, *protected or otherwise*, within the Theater Department at the time it rescinded the Charging Party's renewal contract.

The Judge's decision to discredit "any testimony from Respondent's witnesses suggesting that any conduct by [the Charging Party] prior to February 6, 2014 had anything to do with the rescission of his employment contract" (D. 6 at fn. 5), was without basis and goes against the weight of the evidence.[10] The weight of the evidence supports Respondent's contention that, in

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protected e-mail" (D. 6 at fn. 5), the Charging Party testified that the parties did not discuss the February 6, 2014 e-mail at this meeting.

[9] Additionally, even assuming *arguendo* that the Board were to find that the March 11, 2014 *was* an interrogation, it was not unlawful. It is well-settled that interrogations are not *per se* unlawful. *Springfield Day Nursery*, 362 NLRB No. 30 at *18 (2015) (holding that an employer may "exercise a limited privilege to interrogate employees" in the "investigation of facts concerning issues raised." Here, the Respondent was investigating "how the [Theater Department] felt." (Tr. 69:7-10).

[10] As established by the record, the Charging Party's discharge was motivated by his "inappropriate behavior . . . in a school" (Tr.138:1-7) that ran "totally counter to the policies and ethics within the Dalton handbook."

the context of the Charging Party's previous warnings for unprofessional communications, the Charging Party's lack of forthrightness when confronted with his opprobrious statements directed at the senior administration confirmed that the Charging Party was unable to function as a trustworthy and collegial professional within the framework of the Dalton community. Indeed, the Act does not prevent Dalton from enforcing "reasonable rules" such as the expectation that all Dalton teachers remain professional at all times. *Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943) ("The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time").

Here, Respondent's decision not to renew the Charging Party's annual teaching contract was predicated on the Charging Party's unprofessional and opprobrious conduct that ran "totally counter to the policies and ethics within the Dalton community" (Tr. 138:4-7); the Dalton administration ultimately deemed this conduct "harmful to [Dalton's] commitment to fostering and maintaining a culture of collegiality, collaboration and respect." GC-10 at ¶¶1-2.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Board reverse the Judge's decision, grant the exceptions therefrom, and dismiss the Complaint in its entirety.

Date: September 4, 2015
New York, New York

Respectfully submitted,

/s/ Raquel O. Alvarenga

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## CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of **RESPONDENT THE DALTON SCHOOL'S REPLY BRIEF IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW ARTHUR J. AMCHAN AND IN RESPONSE TO THE GENERAL COUNSEL'S ANSWERING BRIEF** in Case No. 02-CA-138611 via electronic filing through the National Labor Relations Board's website, www.NLRB.gov, upon:

Karen P. Fernbach
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**RESPONDENT THE DALTON SCHOOL'S REPLY BRIEF IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW ARTHUR J. AMCHAN AND IN RESPONSE TO THE GENERAL COUNSEL'S ANSWERING BRIEF** was also served, via electronic mail, upon Counsel for the General Counsel, as follows:

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